

Claimant requests that the Board affirm the decision of the ALJ and find that claimant met his burden of proof that he suffered a compensable claim and is entitled to the benefits as detailed in the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant worked in the tool department of respondent. On June 3, 2005, about 9:30 p.m., he walked from the lumber department to the tool department. As he rounded a counter, he stepped on the lip of an impact mat on the floor, his left ankle rolled on its side, and he felt a pop. He felt pain in his left ankle and when he stood, he had to stand on his right foot. He reported his injury to the front-end supervisor and attempted to report it to the manager on duty, however, when he did the manager walked away.

Claimant testified that after he felt the pop in his ankle, he had to take the drawer from his register and give it to the front-end supervisor. While he was walking around the area, he was limping. Claimant left work a short time later and went home. Although the store closed at ten o'clock and, therefore, his shift was almost over, claimant said he actually clocked out early. A few minutes after getting home, he went to the emergency room. There he was told his ankle was broken, and a doctor put a splint on it. Claimant was admitted into the hospital that night and had surgery on his ankle the next day or the day after. Claimant testified that he has now had a total of three surgeries on his ankle since the fracture.

Claimant said he started experiencing numbness and tingling in his right arm, and he also claims the muscles in his hand have deteriorated. His primary physician sent him to Dr. Chan for treatment of his upper extremity conditions. Claimant testified that Dr. Chan said that his upper extremities could be aggravated by the use of the crutches.

Respondent introduced as an exhibit a DVD of a surveillance tape taken at respondent on the evening of claimant's injury. Respondent contends the DVD shows claimant walking normally, without a limp, after 9:30 p.m. on June 3, 2005, and also shows him kicking at a trash can with his right foot after the time he was allegedly injured. Claimant testified that he did not remember kicking a trash can on the evening he was injured but said that he would often kick the trash can back under the counter, where it belonged.

Respondent argues that the DVD shows that claimant was not injured at respondent on June 3, 2005. The DVD did not contain any evidence of claimant stumbling, tripping or rolling his ankle. Neither does the DVD show any signs that claimant was injured, such as limping or favoring his left leg. Respondent also notes that the medical records of Dr. Ha Ta of June 9, 2005, state: "[Claimant] apparently had a fracture of his left ankle. He does not know how he did it"¹

¹P.H. Trans., Resp. Ex. 1 at 1.

Claimant contends the DVD does not show the actual area where his injury occurred. He also asserts that the DVD does not show him “kicking” a trash can but, instead, shows him giving the can a “nudge.” Claimant further argues that the poor-quality DVD does not establish whether he moved with any type of altered gait or limp.

Claimant states that he has uncontrolled Type 1 diabetes, which has complicated his recovery. As a result of this medical condition, he claims the sensation in his left lower extremity is limited due to neuropathy and he may not have been able to immediately appreciate the severity of his injury. Dr. Ta’s medical note of June 8, 2005, previously quoted above, states further: “[Claimant] does have neuropathy so he may not know how it happened.”²

Respondent argues that claimant’s injury did not occur at work but instead must have occurred after claimant left work. In support of that argument, respondent points to the surveillance video that does not show claimant limping and the Progress Note that indicates claimant told Dr. Ta that he did not know how he injured his ankle. And even though claimant is diabetic and suffers from neuropathy, it seems unlikely that claimant fractured his ankle at work and then proceeded to perform his regular work duties. Instead, respondent contends he should be “falling to the ground and writhing in pain.”³

Claimant’s job did require prolonged standing and walking. However, the fact that claimant sought medical treatment soon after leaving work supports claimant’s contention that this accident occurred at work. Moreover, it is uncontroverted that claimant reported his accidental injury to two supervisors that same night before he left work. Uncontroverted evidence which is not improbable, unreasonable or shown to be untrustworthy is generally regarded as conclusive.⁴

The ALJ apparently found claimant to be a credible witness because she found this claim compensable. The Board agrees. The surveillance videotape does not rule out the accident having occurred as claimant described. Although the entry in Dr. Ta’s records is inconsistent with claimant’s testimony, standing alone, it is not fatal to this claim. Claimant was seeing Dr. Ta for his diabetes. Dr. Ta was not the treating physician for the ankle fracture and, therefore, may not have been as concerned about obtaining a complete history regarding that injury. Based on the record presented to date, the greater weight of the evidence is that claimant’s injury occurred at work as alleged by claimant.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 7, 2006, is affirmed.

²*Id.*

³Respondent’s Brief to Appeals Board (Mar. 2, 2006) at 6.

⁴*Overstreet v. Mid-West Conveyor Co., Inc.*, 26 Kan. App. 2d 586, 589, 994 P.2d 639 (1999).

IT IS SO ORDERED.

Dated this _____ day of April, 2006.

BOARD MEMBER

c: Gary K. Albin, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director